No. 91-694

In the Supreme Court of the United States

OCTOBER TERM, 1991

WILLIAM E. SCHRAMBLING ACCOUNTANCY CORPORATION, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

KENNETH W. STARR
Solicitor General

SHIRLEY D. PETERSON
Assistant Attorney General

JONATHAN S. COHEN
TERESA E. MCLAUGHLIN
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether issuance of a procedurally-defective notice of tax levy that contains "return information" violates Section 6103 of the Internal Revenue Code, 26 U.S.C. 6103, if the "return information" has already properly been made a matter of public record.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported as 937 F.2d 1485. The opinion of the district court in *Schrambling* v. *United States* (Pet. App. 2b-26b) is reported as 689 F. Supp. 1001. The opinion of the district court in *Allen* v. *United States* (Pet. App. 1c-35c) is unreported.

JURISDICTION

The judgment of the court of appeals was entered July 5, 1991. The petition for a writ of certiorari was filed on October 3, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case involves two separate civil actions commenced against the United States. In both suits, petitioners claimed that information contained in procedurally-defective notices of tax levy issued by the Internal Revenue Service was confidential "return information" under Section 6103 of the Internal Revenue Code, 26 U.S.C. 6103. They asserted that the United States is therefore liable in damages for the improper disclosure of this information under Section 7431 of the Code, which authorizes suits against the United States "[i]f any officer or employee of the United States knowingly, or by reason of negligence, discloses any return or return information * * * in violation of any provision of Section 6103" (26 U.S.C. 7431(a)(1)).[1] In both suits, the information allegedly "disclose[d]" in the defective tax levies had previously been fully set forth in lawful, properly recorded public notices of federal tax liens.

1. a. Petitioner William E. Schrambling Accountancy Corporation (Schrambling) was delinquent in paying federal employment taxes and in filing corporate income tax returns in 1979. Lawful and proper notices of federal tax lien were recorded against Schrambling with the San Francisco County Recorder on four dates in 1982 and 1984, disclosing the name of the corporation, the taxes and tax periods involved, the dates of assessment, the corporation's

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[1] Section 7431(b) further provides that there shall be no liability in the case of a "disclosure which results from a good faith, but erroneous, interpretation of section 6103." 26 U.S.C. 7431(b). Section 7431(c) authorizes a damage recovery of costs, actual damages, punitive damages in the case of willful or grossly negligent disclosures, and a minimum damage award of $1,000 for each act of unauthorized disclosure. 26 U.S.C. 7431(c).

tax identification number, the unpaid balance of the assessments, and stating that the corporation had negleced to pay the tax after notice and demand (Pet. App. 4a-5a).

In 1984, Cheryl Matthews, a Revenue Officer employed by the Internal Revenue Service (IRS), was assigned to collect the corporation's delinquent taxes and to obtain delinquent tax returns. In June 1984, Matthews delivered to Schrambling a Final Notice and Demand pursuant to Section 6331(d) covering delinquent employment taxes for six quarters in 1981 and 1982 (Pet. App. 4a).[2]

In October 1984, the Schrambling case was reassigned to Revenue Officer Charles Stegner. Stegner obtained an update on the corporation's tax liabilities and identified assessments for employment taxes for additional tax periods. Notices of federal tax lien had been duly recorded respecting these additional employment tax liabilities, but notice of intent to levy to satisfy those liabilities had not been served upon the corporation in accordance with Section 6331(d). See note 2, *supra*. Stegner overlooked this fact in issuing three series of notices of levy. On October 9, 1984, he mailed 16 notices of levy to banks to collect

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[2] Section 6331(a) of the Code authorizes the collection of tax by levy "[i]f any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand." 26 U.S.C. 6331(a). Under Section 6331(d) as in effect at the time of the levies here in issue, a levy could be made "only after the Secretary has notified such person in writing of his intent to make such levy * * * no less than 10 days before the day of the levy." Effective with respect to levies made after July 1, 1989, however, the waiting period under Section 6331(d) has been extended from 10 to 30 days after a notice of intent to levy has been issued. See Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, § 6236(a)(1) and (h)(1), 102 Stat. 3737, 3740-3741.

the taxes due for the additional periods, as well as those listed in the notice of intent to levy served in June 1984. On November 6, 1984, Stegner mailed notices of levy for the same tax periods to the 22 clients who were shown to owe the largest amounts to Schrambling and Chu, a partnership of which the corporation was a partner. On November 20 and 21, 1984, he mailed notices of levy for the same periods to the remaining 55 clients of the partnership. The notices of levy issued by Stegner did not comport with Section 6331(d) in that they sought to collect taxes for tax periods not listed in the notice of intent to levy that had been served by Matthews in June 1984 (Pet. App. 4a). The return information set forth in the notices of levy, however, had previously been properly disclosed in the recorded notices of tax lien (*id.* at 5a).

b. On November 19, 1986, Schrambling filed a complaint for damages under Section 7431 of the Code against the United States in the United States District Court for the Northern District of California.[3] Schrambling asserted that the issuance of the November notices of levy resulted in the disclosure of confidential return information in violation of Section 6103 because the IRS had not previously served notices of intent to levy for *all* tax periods encompassed by the notices of levy, as required by Section 6331(d). Schrambling sought compensatory damages in the amount of $847,000 and punitive damages in like amount (Pet. App. 5a).

The government contended that the notices of levy did not violate Section 6103 because the information contained in the notices was no longer confidential,

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[3] Stegner was initially named as a defendant but was thereafter voluntarily dismissed (Pet. App. 5a).

having already been publicized in the lawful and proper notices of federal tax lien recorded in the San Francisco County Recorder's office. Following a bench trial, however, the district court held that, while Schrambling's claims based on the notices of levy sent on November 6, 1984, were barred by the two-year statute of limitations set forth in Section 7431 (Pet. App. 15b-16b), the disclosure of tax return information in the remaining 55 notices of levy violated Section 6103 of the Code (Pet. App. 19b-20b). The district court therefore found the government liable for $55,000 in damages under Section 7431 (Pet. App. 26b).

2. a. Petitioner Harold Allen owed federal income tax for 1980. A valid assessment for these taxes was made in March 1984. A valid notice of federal tax lien for this assessed liability was recorded in the Santa Clara County Recorder's Office in July 1984. The notice of lien set forth Allen's name, address, social security number, the tax period in question, the type of tax involved, the date of assessments, the unpaid balance of assessments, and stated that Allen had neglected to pay the tax after notice and demand. A notice of wage levy was issued to Allen's employer for the 1980 taxes on September 27, 1988. It is undisputed that this notice of levy was proper (Pet. App. 6a).

On November 3, 1988, Allen filed a petition under Chapter 7 of the Bankruptcy Code, listing the 1980 taxes as a liability. Under the automatic stay provision (11 U.S.C. 362(a)(6)), the government was then barred from pursuing collection against Allen for any claim that arose prior to the bankruptcy filing. On November 9, 1988, the government released the wage levy of September 27. On November 20, 1988, however, the IRS issued a second notice of

wage levy for the 1980 assessment, which it released on December 20, 1988. A third notice of levy was issued on December 11, 1988, to Allen's bank (Pet. App. 6a). In March 1989, Allen and the government filed a stipulation in Allen's bankruptcy case that the 1980 assessment was dischargeable (*ibid.*).

b. On April 26, 1989, Allen brought suit in the United States District Court for the Northern District of California seeking damages under Section 7431 of the Code, claiming that the second and third notices of levy were issued in contravention of the automatic stay under the Bankruptcy Code and were therefore improper disclosures of return information under Section 6103. Allen's attorney sent the government a letter advising of Allen's bankruptcy, and included the stipulation discharging his 1980 tax liability. On May 28, 1989, the government issued a fourth notice of levy to Allen's bank, and Allen amended his complaint to seek damages arising from that levy (Pet. App. 6a).

The district court granted summary judgment to Allen and awarded him $3,000 in damages. The court held that the second and third notices of levy had been issued in violation of the automatic stay and the fourth notice of levy violated 11 U.S.C. 524 because the 1980 tax liability had been discharged. Pet. App. 34c. Relying on provisions of Section 6103(k)(6) that authorize a disclosure of return information only when "necessary" to effect a levy, the court held that Allen was entitled to recover damages under Section 7431. The court reasoned that, "since there is no necessity or authority to issue an invalid levy, disclosure of information in an invalid levy constitutes [a] violation of § 6103" (Pet. App. 16c). The court acknowledged that the information in the last three notices of levy had previously been properly disclosed

on three separate occasions: (i) in the notice of lien filed in the public records of the Santa Clara County Recorder's Office; (ii) in the first validly-issued notice of levy; and (iii) by Allen himself in his bankruptcy petition. The court held, however, that the prior publication of this return information did not destroy its confidential nature (*id.* at 19c-30c).

3. The court of appeals reversed the judgment of the district court in both cases. Relying on its earlier decision in *Lampert* v. *United States*, 854 F.2d 335, 338 (9th Cir. 1988), cert. denied, 490 U.S. 1034 (1989), the court held that "[d]isclosure of return information that is not confidential does not violate Section 6103" (Pet. App. 7a). Because "[t]he recording of federal tax liens * * * and the filing of a bankruptcy petition places [the return] information * * * in the public domain" (*id.* at 11a), the "information * * * is no longer confidential [and] there can be no violation of Section 6103" (*ibid.*). Having disposed of the cases in this manner, the court found it unnecessary to reach the question "whether improperly issued levies, containing confidential tax return information, may constitute a violation of Section 6103" (*ibid.*).

ARGUMENT

The court of appeals correctly held that technically-defective notices of levy that contain "return information" do not violate Section 6103 of the Code when the same information has previously been disclosed in properly-filed federal tax liens. The decision in this case conflicts, however, with the Tenth Circuit's decisions in *Rodgers* v. *Hyatt*, 697 F.2d 899 (1983), and *Chandler* v. *United States*, 887 F.2d 1297 (1989).

Because this conflict of authority will place revenue officers under disparate obligations in different regions of the country, and because the question presented in this case is one of considerable importance to the administration of the tax laws, we do not oppose the granting of certiorari in this case.

1. Section 6103 of the Code "lays down a general rule that 'returns' and 'return information' as defined therein shall be confidential" (*Church of Scientology* v. *IRS*, 484 U.S. 9, 10 (1987)). The statute was enacted in response to revelations that tax return information had been used for political purposes during the Watergate era. See S. Rep. No. 938, 94th Cong., 2d Sess. 317-318 (1976); 122 Cong. Rec. 24,012-24,013 (1976) (Sen. Dole); *Reuckert* v. *IRS*, 775 F.2d 208, 210 (7th Cir. 1985). Congress recognized, however, that there is often a legitimate need for the disclosure of returns and return information. The statute therefore contains several provisions authorizing the IRS to disclose return information for tax administration and collection purposes and for other governmental agencies to use for statistical or law enforcement purposes. See 26 U.S.C. 6103(b)-(q). The provisions authorizing disclosure were intended to strike a balance between "the right of taxpayers to the privacy of tax information in the hands of the IRS and the legitimate needs of others for access to that information" (*Stokwitz* v. *United States*, 831 F.2d 893 (9th Cir. 1987), cert. denied, 485 U.S. 1033 (1988); see *United States* v. *Bacheler*, 611 F.2d 443, 446 (3d Cir. 1979)).

Although Congress placed restrictions upon the disclosure of return information, it was careful to preserve the government's ability to use such information for the primary purpose for which it is col-

lected—administering the tax laws. The disclosure of return information "in connection with * * * any * * * collection activity" is specifically authorized by Section 6103(k)(6) "to the extent that such disclosure is necessary in obtaining information, which is not otherwise reasonably available, with respect to * * * liability for tax, or the amount to be collected or with respect to the enforcement of any other provision of this title." 26 U.S.C. 6103(k)(6). Regulations issued under Section 6103(q) to implement Section 6103(k)(6) authorize the disclosure of return information and taxpayer identity information when necessary to establish liens against a taxpayer's assets or to effect levies. 26 C.F.R. 301.6103(k)(6)-1(a) and (b)(6).

The court of appeals correctly held that the return information contained in the defective notices of levy did not violate Section 6103 because that same information had previously been properly disclosed in the publicly recorded notices of federal tax lien. Documents filed in the office of county recorder in California are public records open for public inspection at all times (Cal. Gov't Code § 6253 (West Supp. 1990)), and the act of recording "provides constructive notice of the contents of the documents creating the [lien]" (*Bluxome Street Assoc.* v. *Firemen's Fund Ins. Co.*, 206 Cal. App. 3d 1149, 1158, 254 Cal. Rptr. 198, 204 (1988)). Once information properly has been made part of the public domain—as when a notice of tax lien has been recorded with the county clerk—that information can no longer be regarded "confidential" within the meaning of Section 6103. The republication of information that is no longer "confidential" is not a violation of Section

6103. See *Lampert* v. *United States*, 854 F.2d 335 (9th Cir. 1988), cert. denied, 490 U.S. 1034 (1989).[4]

Lampert v. *United States* involved various press releases issued by a U.S. Attorney that summarized tax evasion charges, convictions and sentences and announced the commencement of an action seeking a permanent injunction against a taxpayer's promotion and sale of abusive tax shelters. The subjects of the press releases sued for wrongful disclosure of return information. The court of appeals held that the

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[4] Having found that the information disclosed in the notices of levy was no longer confidential, the court of appeals did not find it necessary to address the government's alternative argument that the disclosures were authorized under Section 6103(k)(6), which permits the disclosure of return information in connection with collection activity when disclosure is necessary for enforcement of any Code provision. Several courts have held that a disclosure of information in connection with collection activity is authorized even if the underlying levy is technically invalid. *E.g.*, *Flippo* v. *United States*, 670 F. Supp. 638 (W.D.N.C. 1987), aff'd without published opinion, 849 F.2d 604 (4th Cir. 1988); *Christensen* v. *United States*, 733 F. Supp. 844, 854 (D.N.J. 1990), aff'd without published opinion, 925 F.2d 416 (3d Cir. 1991); *Traxler* v. *United States*, 88-2 U.S. Tax Cas. (CCH) ¶ 9627 (E.D. Cal. 1988). Other courts, however, have concluded that a disclosure of return information is not authorized when the collection action which results in the disclosure is defective, either because there is no underlying tax liability or because procedural statutory prerequisites to the collection activity have not been satisfied. *E.g.*, *Rorex* v. *Traynor*, 771 F.2d 383, 386 (8th Cir. 1985); *Husby* v. *United States*, 672 F. Supp. 442, 444-445 (N.D. Cal. 1987). To the extent that those cases hold that a disclosure of return information is not authorized when the collection action that results in the disclosure is defective, we believe that they were wrongly decided; the proper inquiry under Section 6103(k)(6) is whether the disclosures made were necessary to effect collection activity, not the collateral question whether the collection activity was

republication of information already disclosed in public proceedings does not violate Section 6103. The court reasoned that "[o]nce tax return information is made a part of the public domain," it is no longer "confidential" within the meaning of Section 6103 (*id.* at 338).[5] As the court of appeals observed in the present case, the public recording of tax liens "exposes the information to as much, if not greater, publicity than publication in a judicial proceeding" (Pet. App. 9a-10a).

2. Although the decision in this case is correct, we agree with petitioners (Pet. 7) that it is in conflict with the Tenth Circuit's decision in *Rodgers* v. *Hyatt*, 697 F.2d at 904. In *Rodgers*, the initial disclosure of return information occurred at a summons enforcement hearing. Hyatt, an IRS agent, testified at the hearing that there had been allegations that Rodgers was trafficking in stolen oil and had not reported all his income from his oil sales. The summons was ordered enforced. Rodgers appealed to the

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performed in accordance with applicable Code procedures. The "exclusive remedy for recovering damages" for unauthorized collection activities (see 2 H.H. Conf. Rep. No. 1104, 100th Cong., 2d Sess. 228-229 (1988)) is an action for damages under Section 7433 of the Code, enacted as part of the Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, § 6241(a), 102 Stat. 3747-3748, which permits recovery if an IRS employee "recklessly or intentionally" disregards any provision of the Code or regulations in connection with collection activity occurring after November 10, 1988. See 26 U.S.C. 7433.

[5] This, of course, accords with the normal meaning of the term "confidential," which includes communications "known only to a limited few: not publicly disseminated." *Webster's Third New International Dictionary* 476 (1986). Congress presumably was aware of this common meaning of the term "confidential" in selecting it for use in Section 6103.

Tenth Circuit, which affirmed in an opinion that repeated these same allegations concerning Rodgers (*United States* v. *MacKay*, 608 F.2d 830, 832 (1979)). At a subsequent meeting with representatives of another taxpayer, Hyatt made reference to the allegations that Rodgers was dealing in stolen oil. Rodgers then brought a damages action against Hyatt under the pre-1982 predecessor of Section 7431. A jury gave Rodgers the minimum award of $1,000, and the government appealed.

The court of appeals affirmed. In reaching its conclusion, the court did not directly address the threshold question whether there could be a wrongful disclosure of return information that had previously been disclosed in open court. Instead, the court stated that it "need not reach the loss of confidentiality contention advanced by Hyatt" because his disclosures "were violative of the provisions of § 6103 (k)(6)" (697 F.2d at 904). If this statement in the court's opinion were read broadly—to suggest that return information can *never* lose its confidential status, even after it has been made public—it obviously would have been in conflict with the rationale of the Ninth Circuit in *Lampert*. At the time the Ninth Circuit issued its opinion in *Lampert*, however, we believed that the Tenth Circuit might confine its holding in *Rodgers* to situations where the disclosure of return information was found to be "abusive" (697 F.2d at 906). As matters then stood, it was not certain that the Tenth Circuit would find a wrongful disclosure in circumstances similar to those of the *Lampert* case, where the press releases served the legitimate interest of publicizing the government's enforcement efforts. For that reason, we opposed the petition for certiorari filed in *Lampert*, in which the

petitioners asserted a conflict with *Rodgers* v. *Hyatt* (see 88-1200 Br. in Opp. at 9-10).

It has since became apparent, however, that the Tenth Circuit does not read *Rodgers* narrowly. In *Chandler* v. *United States*, 887 F.2d 1397 (1989), issued six months after we filed our opposition in *Lampert*, the Tenth Circuit affirmed an award of damages under Section 7431 based solely upon a clerical mistake that led to the disclosure in a tax levy of information that the *taxpayers themselves* already had disclosed in an unsuccessful suit to enjoin collection of the taxes they owed.[6] See 887 F.2d at 1398.

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[6] In *Chandler*, a frivolous return penalty was assessed against the taxpayers under Section 6702 for striking out the jurat on their tax return. The IRS sent the taxpayers a notice and demand for payment, with an accompanying form that called for them to write their social security numbers on their check. The Chandlers brought suit to enjoin the IRS from collecting the penalty plus interest, and that suit was ultimately dismissed. See 687 F. Supp. 1515, 1516 (D. Utah 1988). While that suit was pending, they paid $512.60 by check, but they did not write their social security numbers on the check, as requested. When the check reached the IRS, the person processing the payment inadvertently entered their street address number into the computer as the taxpayer's social security number. Because that clerical mistake yielded a response of no account under that number, the money was deposited into a suspense account. The taxpayers' liability therefore remained listed as unpaid and outstanding. In due course a revenue officer served a notice of levy for the $512.60, plus accrued interest, on Mrs. Chandler's employer. The Chandlers then brought a second suit to enjoin the collection of the money, and on further investigation the levy was released, except as to $14.64 in interest charges remaining unpaid. Although the Chandlers themselves had disclosed the pertinent information in their first suit before the notice of levy was issued, they brought a wrongful disclosure suit

The Tenth Circuit's opinion in *Chandler* makes it apparent that *Rodgers*, as applied by that court, conflicts with *Lampert* and with the decision in this case. See *Thomas* v. *United States*, 890 F.2d 18, 20 (7th Cir. 1989) (referring to "the conflict between the Ninth and Tenth Circuits over whether the disclosure of return information in a judicial record bars the taxpayer from complaining about any subsequent disclosure").[7] The conclusion in this case that, once return information is publicized, further disclosure is not actionable (Pet. App. 11a) conflicts with the Tenth Circuit's finding of liability under Section 7431 for disclosure of return information that has previously been made a matter of public record.

3. Petitioner errs in contending (Pet. 16) that the decision in this case conflicts with *United States Department of Justice* v. *Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989). The

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under Section 7431, and prevailed. *Ibid.* They were awarded $1,000, and the Tenth Circuit sustained that award in a brief *per curiam* opinion citing *Rodgers* and affirming the judgment for "substantially the reasons stated by the district court" (887 F.2d at 1398).

[7] In *Thomas* v. *United States*, the Seventh Circuit held that the taxpayer was not entitled to an award of damages under Section 7431 when a Tax Court decision is publicized in an IRS press release. The court noted that it was not necessary to decide "whether the disclosure of the information by the Tax Court removed the protective cloak of section 7431 and allowed the Internal Revenue Service to * * * publicize so much of the information found [in Thomas's file] as had been disclosed in the opinion" (890 F.2d at 20-21), because the government was entitled to prevail there on the "narrower ground" (*id.* at 20) that "[t]he information disclosed in the press release did not come from Thomas's tax return" (*ibid.*) but, rather, from the Tax Court's opinion.

Reporters Committee decision concerns the scope of the protection afforded to private information contained in government records from disclosure under the Freedom of Information Act. The scope of protection afforded to *private* information under the FOIA has no bearing on the scope of protection afforded to *confidential* information under the Internal Revenue Code. Different statutes and different interests are involved in the two situations. See note 5, *supra*. The decision in *Reporters Committee* recognizes that a loss of confidentiality and a loss of privacy are far different concepts, for the Court emphasized in that case that information already contained in public records—that could not in any sense be said to be "confidential"—could nonetheless be "private" information in the sense that it was personal or embarrassing in content. See 489 U.S. at 769-771. See also *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 494-495 (1975). Nothing in *Reporters Committee* provides support for petitioners' oxymoronic conclusion that information in the public domain is "confidential" information.

4. The question presented in this case is of substantial administrative importance. As the numerous cases involving this issue reflect, whether a defective notice of levy containing return information that has previously properly been made public creates a claim for damages under Section 7431 is a question that frequently recurs.[8] Resolution of this conflict be-

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[8] In addition to the cases previously cited in this brief, *United Energy Corp.* v. *United States*, 622 F. Supp. 43, 46 (N.D. Cal. 1985), *United States* v. *Posner*, 594 F. Supp. 930, 936 (S.D. Fla. 1984), and *Cooper* v. *IRS*, 450 F. Supp. 752 (D.D.C. 1977), all hold that there can be no actionable disclosure of return information that has been publicized in

tween the circuits is needed to avoid continuing uncertainty and uneven application of this statutory scheme.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

SHIRLEY D. PETERSON
Assistant Attorney General

JONATHAN S. COHEN
TERESA E. MCLAUGHLIN
Attorneys

DECEMBER 1991

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prior court proceedings. There are also, however, decisions to the contrary. See, *e.g.*, *Rodgers* v. *Hyatt*, *supra*; *Malis* v. *United States*, 87-1 U.S. Tax Cas. (CCH) ¶ 9212 (C.D. Cal. 1986); *Johnson* v. *Sawyer*, 640 F. Supp. 1126, 1132-1133 (S.D. Tex. 1986).

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